

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

SPARTECH POLYCOM, INC.

Employer

and

Case 6-RC-12743

TEAMSTERS LOCAL UNION NO. 205 AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner

REGIONAL DIRECTOR'S REPORT ON CHALLENGED BALLOTS

The Petitioner asserts that the challenges to the ballots of Bernard Clark, Clifford Loughner, Todd Myers and Larry Wallach should be sustained. I have considered the evidence and the positions of the parties on the issue. As discussed below, I have concluded that the challenges to the four ballots should be sustained. Accordingly, I have recommended that the Board issue an appropriate revised Tally of Ballots and a Certification of Representative.

I. PROCEDURAL HISTORY

Pursuant to a Stipulated Election Agreement between Spartech Polycom, Inc. and Teamsters Local Union No. 205 affiliated with the International Brotherhood of Teamsters, approved by the Regional Director on April 22, 2010, an election by secret ballot was conducted on Thursday, May 20, 2010 and Friday, May 21, 2010, among employees in the unit heretofore found appropriate.¹ The results of the election are set forth below:²

¹ The appropriate unit is: "All full-time and regular part-time production and maintenance employees, including production operators, maintenance mechanics, laboratory technicians, shipping and receiving employees, MRO buyers and traffic coordinators employed by the Employer at its Donora, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees."

1. Approximate number of eligible voters.....	75
2. Void ballots.....	0
3. Votes cast for Petitioner.....	35
4. Votes cast against participating labor organization	33
5. Valid votes counted	68
6. Challenged ballots	4
7. Valid votes counted plus challenged ballots.....	72
8. Challenges are sufficient in number to affect the results of the election.	

Inasmuch as the challenged ballots are sufficient to affect the results of the election, I have, pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, made an investigation, during which the parties were afforded an opportunity to submit evidence bearing on the issues.³ Having duly considered the results thereof, I hereby make the following report.

II. FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The ballots of Bernard Clark, Clifford Loughner, Todd Myers and Larry Wallach were challenged by the Petitioner on the ground that Clark, Loughner, Myers and Wallach were not employed by the Employer as of the payroll period ending date for eligibility set forth in the Stipulated Election Agreement, April 18, 2010.⁴ The investigation disclosed that all four were paid for time spent in orientation and training prior to the eligibility date but did not perform any unit work until after the eligibility date. From March 14, 2010 to March 17, 2010, the Employer placed an advertisement in the Observer-Reporter Newspaper, the Washington County newspaper, for employees to fill full-time "manufacturing positions." All four of the individuals

² No objections were filed to the conduct of the election or to conduct affecting the results of the election.

³ Employer Plant Manager Gisoni submitted an affidavit taken by a Board Agent, and the Employer submitted relevant documents referred to in this Report. As the facts established by this evidence are not in dispute, there is no need for an evidentiary hearing.

⁴ In its statement of position concerning the eligibility of the challenged voters, the Petitioner also contends that the Employer hired the four challenged voters for the purpose of "padding the payroll" in the face of the election and, therefore, they are ineligible to vote. I will not address that contention since the stated reason for the challenges was solely that the voters were not employed during the payroll period for eligibility. Moreover, such an assertion would be the basis for the filing of an unfair labor practice charge, rather than a challenge to a voter's eligibility and no charge has been filed.

whose ballots were challenged submitted employment applications to the Employer and were interviewed twice prior to being offered employment by the Employer as general laborers. Their initial interviews took place on March 18 and 19, 2010, and their second interviews were conducted during the period from March 31, 2010 to April 6, 2010. The four individuals were offered employment on April 13, 2010.

On April 16, 2010, the Employer's Plant Manager, Matthew Gisoni, called all of the named individuals to schedule orientation and safety training for them on April 17, 2010. On April 17, 2010, Clark, Loughner, Myers and Wallach all reported to the Employer's facility at 8:00 a.m. Plant Manager Gisoni met with them on that date in the conference room located in the office area of the facility until 10:30 a.m. While there, all four individuals executed Department of Homeland Security I-9 forms, emergency contact information and employee information sheets, Federal W-4 income tax withholding forms and other routine employment-related documents. They were provided medical benefits booklets and enrollment forms, the Employer's policies and practices manual, safety manual, and 401(k) enrollment forms. They were also informed of the Employer's paid time-off and holiday policies.

During the April 17, 2010 meeting, the named individuals were shown a 32-minute video entitled "Environmental Health and Safety Orientation", which covers such topics as emergency evacuation procedures, personal protective equipment, safe work practices and accident reporting. A question and answer session of an estimated 5-10 minutes length followed the showing of the video.

At no time during the time on April 17, 2010, did any of the named individuals go into the Employer's plant or on to the production floor. Rather, they all remained in the conference room during the entire time period.⁵ Moreover, prior to April 19, 2010, none of the named individuals

⁵ Although the Employer asserted during the investigation that all four employees were released to work in manufacturing at 10:30 a.m. on April 17, 2010, the probative evidence establishes that they performed no unit work on April 17, 2010, and that they were released to go home at 10:30 a.m. on that date.

performed any of the work listed in the Employer's job description for the position of general laborer, the position for which all four were hired. All four individuals executed timesheets and received 2-1/2 hours' pay for April 17, 2010.⁶

Clark and Wallach began performing bargaining unit work for the Employer on April 19, 2010; Loughner on April 27, 2010, and Myers on May 3, 2010. Clark and Wallach were unemployed at the time they were offered jobs with the Employer, and were immediately available. Loughner and Myers had to work out their notice to their previous employers.

It is well settled that, in order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for certain specified reasons. Dyncorp/Dynair Services, 320 NLRB 120 (1995); Ra-Rich Mfg. Corp., 120 NLRB 1444, 1447 (1958). The Board defines "working" as meaning "actual performance of bargaining unit work"; excluding "participation in training, orientation or other preliminaries." Dyncorp/Dynair, supra, at 121; Emro Marketing Co., 269 NLRB 926, fn. 1 (1984); Roy N. Lotspeich Publishing Co., 204 NLRB 517 (1973).

In this case, none of four challenged voters engaged in the "actual performance of bargaining unit work" as of the April 18, 2010, payroll period ending date for eligibility. Rather, on April 17, 2010, the last day before the payroll period ending date, they reviewed and executed employment-related documents and they viewed a video concerning health and safety orientation, all of which was preliminary to and necessary for beginning work at the Employer's facility, but which did not constitute "bargaining unit work." The challenged voters did not go onto the Employer's production floor on April 17, 2010, but remained in the office area for 2-1/2 hours. See F. & M. Importing Co., 237 NLRB 628 (1978), in which the Board sustained the

⁶ Contrary to the Petitioner's assertion that the Employer had not paid employees for similar sessions in the past, payment for orientation appears to be a practice, as evidenced by documents supplied by the Employer covering employees who were hired by the Employer both before and after the hire of the challenged voters in the instant case.

challenges to the ballots of two employees who were hired on the last day of the eligibility period and who were paid for 1 hour's "orientation," but who "did not actually perform unit work that day."

The Employer cites CWM, Inc., 306 NLRB 495, 496 (1992), in support of its position that the challenged voters in this case began their employment with the Employer on April 17, 2010. CWM is distinguishable from the instant case. The challenged voters in CWM, in accordance with Federal and state regulations, attended an orientation and training program which lasted a full 5 days, as compared with the mere 2-1/2 hours' orientation and training program which the challenged voters attended in this case. The training provided to the challenged voters in CWM was much more comprehensive and extensive than that given to the challenged voters in this case and included associated testing. Only a portion of the first day of the 5-day training and orientation program in CWM was devoted to completing various employment forms and learning about the employer's policies, while the challenged voters in this case were released on April 17, 2010, after the completion of such preliminaries.

Moreover, in CWM, midway through the final day of orientation and training, the employees were released to begin their duties in the production areas and would have worked on that date but for the fact that the employer did not have all of the required protective clothing and equipment. The Board found the employees in CWM to be "working" (under the Board's definition), as of the time when they were released to their begin duties on that date. In contrast, the challenged voters in this case were sent home upon their completion of 2-1/2 hours of orientation and training. The Employer had no intention of having them perform bargaining unit work on that date, and they did not do so.

In CWM, the Board distinguished the comprehensive 5-day training undergone by the contested voters in that case with the "mere orientation and preliminaries" at issue in Emro, supra, and F. & M. Importing, supra. In Emro, supra, the Board sustained the challenge to the ballot of an employee who, like Clark, Loughner, Myers and Wallach, reported for to the

Employer on the last day of the eligibility period, was paid for 2 hours of “orientation and training”, but “did not perform unit work until after the end of the eligibility period.”⁷

III. RECOMMENDATIONS

I find that Bernard Clark, Clifford Loughner, Todd Myers and Larry Wallach were not employed and working for the Employer as of April 18, 2010, the payroll period ending date for eligibility in the instant case. I, therefore, recommend that the challenges to the ballots of Bernard Clark, Clifford Loughner, Todd Myers and Larry Wallach be sustained and that an appropriate Revised Tally of Ballots and a Certification of Representative issue.

IV. EXCEPTIONS

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be

⁷ Cf. PPG Aerospace Industries, Inc., 355 NLRB No. 18 (March 4, 2010), wherein the Board found 7 voters challenged as being hired after the cutoff date (August 27, 2006) to be eligible voters. The Board noted that these employees were hired on August 21, 2006, were placed on the Employer's payroll and earned wages beginning on August 21, 2006, and worked under the supervision of PPG supervisors who controlled the details of their work prior to August 27, 2006. See also Pep Boys-Manny, Moe and Jack, 339 NLRB 421 (2003) in which the Board found a challenged voter to be eligible since, during the eligibility period, the employee performed actual unit work in his on-the-job training—he was not engaged

received by the Executive Secretary of the Board in Washington, D.C. by close of business on July 6, 2010, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁸ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the

in mere orientation and preliminaries, but was employed and working in the unit during the eligibility period.

⁸ A Request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website

Dated at Pittsburgh, Pennsylvania, this 22nd day of June 2010.

Robert W. Chester
Regional Director, Region Six

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